Supreme Court, U. S.
FILED
MAY 20 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1623

FIDELITY CORPORATION,

Petitioner,

v.

REGAL WARE, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the yet-unpublished judgment of the United States Court of Appeals for the Fourth Circuit, entered in this case on January 11, 1977. A copy of the opinion is submitted under separate cover in accordance with Rule 23. However, only page 48, Section XII, is relevant to the question raised in this Petition.

JURISDICTION

The judgment of the Court of Appeals was rendered on January 11, 1977, and rehearing was denied on April 7, 1977. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). Other jurisdictional data required by Rule 23 is set forth herein as part of the Statement of the Case.

STATEMENT OF THE CASE

On August 20, 1974, at the conclusion of a three-day trial, District Judge Robert R. Merhige, Jr., presiding in the United States District Court for the Eastern District of Virginia, dictated from the bench his Findings of Fact and Conclusions of Law in this case. The court's decision that Fidelity Corporation was not liable to Regal Ware, Inc. for the indebtedness of American Foresight, Inc., a Fidelity subsidiary, was incorporated in a Judgment Order of August 28, 1974, entered *nunc pro tunc* to August 20, 1974. (Exhibit A)

On August 28, 1974, Regal Ware, Inc. (hereinafter "Regal") filed in the District Court a "motion" for a new trial and to alter or amend, purportedly pursuant to Rule 59(e) F.R.C.P. However, this "motion" *stated no grounds whatsoever*, admitting instead that it was "for reasons to be assigned." (Exhibit B) The grounds for the "motion" were stated in a memorandum mailed to the District Court and counsel for Fidelity Corporation (hereinafter "Fidelity") on October 10, 1974, *43 days after the deadline for filing the motion.*

On December 5, 1974, Regal filed its notice of appeal of this case to the United States Court of Appeals for the Fourth Circuit. *This notice of appeal*

was filed 107 days after the date of entry of the judgment by the District Judge, whereas the Federal Rules of Appellate Procedure require that it be filed within 30 days. (Exhibit C) Fidelity filed a motion to dismiss the appeal for failure to file a timely notice of appeal; again raised the point on brief, and presented it for a third time in its Petition for Rehearing, all of which were denied by the Court of Appeals without explanation. It is from the latter Denial Order dated and entered February 23, 1977, (Exhibit D) that this Petition emanates.

SOLE QUESTION PRESENTED FOR REVIEW

Does a United States Court of Appeals have *jurisdiction* to hear and decide a case where the notice of appeal is filed 107 days after the date of entry of judgment by the District Court, when Rules 3 and 4 of the Federal Rules of Appellate Procedure require such filing to be made within 30 days after the date of entry of judgment and the only interim pleading is a so-called "motion" that states no grounds therefor?

FEDERAL RULES INVOLVED

The principal rules involved in this Petition are Rules 59(e) and 7(b)(1) of the Federal Rules of Civil Procedure, and Rules 4(a) and 26(b), Federal Rules of Appellate Procedure, which state in pertinent part as follows:

> Rule 59(e): "A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment."

Rule 7(b)(1): "An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, *shall state with particularity the grounds therefor*, and shall set forth the relief or order sought." (Emphasis supplied)

Rule 4(a): "In a civil case * * * in which an appeal is permitted by law as of right from a district court to a court of appeals *the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days of the date of the entry of the judgment or order appealed from*; * * *

"The running of the time for filing a notice of appeal is terminated as to all parties by a timely *motion* filed in the district court by any party pursuant to the Federal Rules of Civil Procedure . . ." (Emphasis supplied)

Rule 26(b): "The court for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of such time; *but the court may not enlarge the time for filing a notice of appeal . . .*" (Emphasis supplied)

REASONS FOR GRANTING THE WRIT

The writ of certiorari should be granted in this case for the following extremely important reasons:

1. The United States Court of Appeals for the Fourth Circuit has rendered a decision which is in conflict with decisions of other courts of appeals on the same matter.

2. The decision of the United States Court of Appeals for the Fourth Circuit on the Federal Rules question presented for review conflicts with the decisions of the Supreme Court of the United States,

and this conflict must be resolved if such rules are to be uniformly and predictably applied.

ARGUMENT

A primary purpose for adoption of both the Federal Rules of Civil Procedure (hereinafter "F.R.C.P.") and the Federal Rules of Appellate Procedure (hereinafter "F.R.A.P.") was to assure prompt, procedurally-defined treatment of cases in the Federal Courts. The rules "shall be construed to secure the just, speedy and inexpensive determination of every action." Rule 1, F.R.C.P. Recognizing that motions frequently are time-consuming in nature, Rule 7, F.R.C.P., specifically incorporates in (b)(2) the requirements of Rule 11, F.R.C.P., that a motion not be interposed for delay. [See "The Ethics of Dilatory Motion Practice: Time for Change" by the Honorable David N. Edelstein, Chief Judge, Southern District of New York, 44 Fordham L. Rev. 1069 (1976)]. Likewise, while Rule 2, F.R.A.P., affords the Courts of Appeals some latitude in modifying those rules, it specifically states by incorporation the Rule 26, F.R.A.P., directive that "*the court may not enlarge the time for filing a notice of appeal . . .*" (Emphasis supplied)

Yet the Court of Appeals for the Fourth Circuit has enlarged the time for filing of a notice of appeal from the 30 days required by Rules 3 and 4, F.R.A.P., to 107 days by treating as valid a "motion" that did not become a valid motion until 43 days after the filing deadline.

Rule 3(a), F.R.A.P., goes out of its way to emphasize that the *validity* of an appeal depends on timely filing of a notice of appeal, and Rule 4(a), F.R.A.P., firmly

establishes the 30 day time limit for such filing. Rule 4 *does* permit termination of the time period if a timely motion is filed under Rule 59, F.R.C.P., to alter or amend a judgment. But in order to be a motion at all, an application must "*state with particularity the grounds therefor . . .*" [Rule 7(b)(1), F.R.C.P.] (Emphasis supplied)

> "Suppose that a purported motion is timely made but is defective by reason of its failure to state any ground for relief with sufficient particularity. Does such a motion terminate the running of the time for appeal? In *Fine v. Paramount Pictures* [181 F.2d 300 (7th Cir., 1950)] it was held that an oral motion for a new trial without reasons assigned therefor did not terminate the time for appeal because the district court was without authority to hear and act upon it. While there is authority to the contrary, that holding appears sound; a motion without any assignment of reasons is hardly a motion." 9 *Moore's Federal Practice* 961

This case does not involve an oral motion, but the principle is the same. *Nor does this case involve a ruling by any court that Regal was misled into thinking that its motion was adequate to terminate the running of the 30 day filing limitation for its notice of appeal, or that there was excusable neglect.* The sole issue presented is whether a Court of Appeals can ignore the mandate of Rules 2, 3, 4, and 26, which in the aggregate state that the notice of appeal *must* be filed within 30 days after the entry of judgment, and yet acquire jurisdiction to hear and decide the case by treating as valid a written "motion" that states no grounds.

The Fourth Circuit stands alone in its apparently affirmative response to this question.

Conversely, this Court has held that timely filing of a notice of appeal is both *mandatory and jurisdictional*, and without it the appellate court is without authority to hear the case. *United States v. Robinson*, 361 U.S. 220, 80 S. Ct. 282, 4 L.Ed.2d 259 (1960); *Coppege v. United States*, 369 U.S. 438, 82 S. Ct. 917, 8 L.Ed.2d 21 (1962); *Berman v. United States*, 378 U.S. 530, 84 S. Ct. 1895, 12 L.Ed.2d 1012, *rehearing denied* 379 U.S. 871, 85 S. Ct. 14 (1964). For in the absence of extenuating circumstances, a principle necessary for the orderly administration of justice must prevail, that being "the principle that litigation must at some definite point be brought to an end. It is a principle reflected in the statutes which limit our appellate jurisdiction to those cases whose review is sought within a prescribed period. Those statutes are not to be applied so as to permit a tolling of their time limitations because some event occurred in the lower court after judgment was rendered which is of no import to the matters to be dealt with on review." *Federal Trade Com. v. Minneapolis-Honeywell R. Co.*, 344 U.S. 206, 73 S. Ct. 245, 97 L.Ed. 245 (1952).

The cases in the various circuits following the rule that timely filing of a notice of appeal is a *prerequisite* to appellate jurisdiction are myriad. Accordingly, only a few of these will be cited here, this being solely for the purpose of establishing the divergence between the practical effect of the Fourth Circuit's holding in the present case and some of the holdings elsewhere.

SECOND CIRCUIT: Stirling v. Chemical Bank, 511 F.2d 1030 (1975); *Federal Deposit Insurance Corp. v. Congregation Poiley Tzedeck*, 159 F.2d 163 (1946)

THIRD CIRCUIT: Boggs v. Dravo Corporation, 532 F.2d 897 (1976); *Rothman v. United States*, 508 F.2d 648 (1975)

FIFTH CIRCUIT: Burnside v. Eastern Airlines, Inc., 519 F.2d 1127 (1975); *Lashley v. Ford Motor Co.*, 518 F.2d 749 (1975)

SEVENTH CIRCUIT: Brainerd v. Beal, 498 F.2d 901 (1974), *cert. denied* 419 U.S. 1069, 95 S. Ct. 655, 42 L.Ed.2d 664 (1974), *rehearing denied* 420 U.S. 913, 95 S. Ct. 836, 42 L.Ed.2d 844 (1975); *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 303 F.2d 609 (1962)

EIGHTH CIRCUIT: United States v. 1,431.80 Acres of Land, Etc., Cross Cty, Ark., 466 F.2d 820 (1972); *Young v. Chicago, Milwaukee, St. Paul and Pacific R. Co.*, 369 F.2d 502 (1966)

NINTH CIRCUIT: United States v. Molitor, 337 F.2d 917 (1964); *Smith v. United States*, 272 F.2d 228 (1959), *cert. denied* 362 U.S. 954, 80 S. Ct. 868, 4 L.Ed.2d 871 (1960), *rehearing denied* 362 U.S. 992, 80 S. Ct. 1080, 4 L.Ed.2d 1024 (1960).

TENTH CIRCUIT: Gooch v. Skelly Oil Company, 493 F.2d 366 (1974) *cert. denied* 419 U.S. 997, 95 S. Ct. 311, 42 L.Ed.2d 270; *Lathrop v. Oklahoma City Housing Authority*, 438 F.2d 914 (1971), *cert. denied* 404 U.S. 840, 92 S. Ct. 132, 30 L.Ed.2d 73 (1971).

If compliance with the time limits set forth in Rule 4, F.R.A.P., is mandatory and jurisdictional, and the Court of Appeals is specifically precluded from enlarging the time permitted for filing a notice of appeal, on what basis does the Fourth Circuit Court of Appeals gain jurisdiction of a case when the notice of appeal is filed 107 days after entry of judgment? No motion was filed that could toll the time for filing. Nor was the District Court ever asked to extend the time for filing the notice of appeal, as it is empowered to do for "excusable neglect" under Rule 4. And the Court of Appeals thrice declined to state its basis for assuming jurisdiction, notwithstanding Fidelity's express request

that it do so. (See Section VI of Fidelity's Petition for Rehearing, attached as Exhibit E)

Possibly the Fourth Circuit Court of Appeals now has expanded on the language of *Witt v. Merrill*, 208 F.2d 285 (4th Cir. 1953), a case involving an oral motion, to say, in effect, that a Court of Appeals may, on its own initiative, expand the period for filing a notice of appeal if, in its opinion, such expansion would be "in the spirit of the rules" *Witt v. Merrill, supra*, at p. 286. [See also *Fishbaugh v. Armour & Co.*, 185 F.2d 541, 542 (4th Cir. 1950)] Should this in fact be the basis for the Fourth Circuit Court of Appeals' decision in the instant case, it should be reviewed by the Supreme Court of the United States, as it not only is in direct conflict with holdings in this Court and the Appeals Courts of other circuits, but is in flagrant violation of Rules 4 and 26, F.R.A.P. *Courts of Appeal are not permitted to regulate their practice in a manner inconsistent with the Federal Rules of Appellate Procedure.* Rule 47, F.R.A.P.

Case-by-case tailoring of the Federal Rules defeats their purpose. While mechanical rules may appear harsh in some cases (although not in the instant case!), they are necessary to achieve uniformity and eliminate procedural uncertainties. *United States v. Indrelunas*, 411 U.S. 216, 93 S. Ct. 1562, 36 L.Ed.2d 202 (1973).

Granting certiorari in this case will clarify an important aspect of the Federal Rules of Appellate Procedure significant to every Federal Court litigant. Rules cease to be rules when those subject to them can no longer rely on their uniform application.

For the foregoing reasons it is submitted that the petition for certiorari should be granted to review the judgment of the United States Court of Appeals for the

Fourth Circuit, and the judgment vacated for want of jurisdiction.

Respectfully submitted,

RICHARD ALLEN REPP
Hirschler, Fleischer, Weinberg,
Cox & Allen
4 North Fourth Street
Richmond, Virginia 23219

CERTIFICATE OF SERVICE

In accordance with the provisions of Rules 21 and 33, Revised Rules of the Supreme Court of the United States, I hereby certify that I have filed forty (40) copies of the foregoing Petition for a Writ of Certiorari in the Clerk's Office, Supreme Court of the United States, and served three (3) copies each upon Israel Steingold, Esq., and upon Steingold and Steingold, counsel of record for Regal Ware, Inc. at 1116 United Virginia Bank Building, Norfolk, Virginia, 23514 and 4905 Radford Avenue, Richmond, Virginia, 23230, their last known addresses, respectively, by depositing same in the United States Mail, first class postage prepaid, this day of May, 1977.

RICHARD ALLEN REPP

FILED
AUG 28 1974
CLERK, U. S. DIST. COURT
RICHMOND, VA.

EXHIBIT A

UNITED STATES DISTRICT COURT
for the
EASTERN DISTRICT OF VIRGINIA –
RICHMOND DIVISION

Civil Action File No. 73-460-R

REGAL WARE, INC.

vs. JUDGMENT

FIDELITY CORPORATION

This action came on for trial before the Court, Honorable Robert R. Merhige, Jr., United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged that the plaintiff take nothing; and that the defendant, FIDELITY CORPORATION, recover of the plaintiff, REGAL WARE, INC., its cost of action.

Dated at Richmond, Virginia, this 28th day of August, 1974, nunc pro tunc the 20th day of August, 1974.

W. FARLEY POWERS, JR.
Clerk of Court

By: /s/ [illegible]
Deputy Clerk

A
COPY
TESTE:
W. FARLEY POWERS, JR., CLERK
BY: /s/ [illegible]
DEPUTY CLERK

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

REGAL WARE, INC.,	:	
Plaintiff,	:	
vs.	:	
	:	CIVIL ACTION
FIDELITY CORPORATION,	:	NO. 73-460-R
and	:	
AMERICAN FORESIGHT, INC.,	:	
Defendants.	:	

MOTION FOR NEW TRIAL AND TO ALTER OR AMEND JUDGMENT

Pursuant to the provisions of Rule 59(a) and (e), FRCP, plaintiff moves the Court to open the judgment entered in this action in favor of Fidelity Corporation on August 20, 1974, take additional testimony, amend the findings of fact and conclusions of law and make new findings and conclusions and direct the entry of a new judgment; and to alter or amend said judgment, for reasons to be assigned upon receipt of transcript from the Court Reporter of the Court's Findings of Fact and Conclusions of Law announced by it on the 19th day of August 1974.

/s/ Israel Steingold
Israel Steingold
Attorney for Plaintiff
1116 United Virginia Bank Bldg.
Norfolk, Virginia

I certify I served a copy of the foregoing Motion for New Trial and to Alter or Amend Judgment on counsel for the defendant by mailing a copy thereof to the office of Richard A. Repp, Esq., Hirschler and Fleischer, 4 North 4th Street, Richmond, Virginia 23219, on the 27th day of August 1974.

/s/ Israel Steingold
Israel Steingold

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

REGAL WARE, INC., Plaintiff,	:	
vs.	:	CIVIL ACTION NO. 73-460-R
FIDELITY CORPORATION, Defendant.	:	

NOTICE OF APPEAL

Notice is hereby given that Regal Ware, Inc., plaintiff above-named, hereby appeals to the United States Court of Appeals for the Fourth Circuit from the final judgment in favor of said defendant entered on the 20th day of August 1974, and from the order denying plaintiff's Motion for New Trial and Motion to Alter or Amend said judgment, entered in this action on the 8th day of November, 1974.

/s/Israel Steingold
ISRAEL STEINGOLD
Attorney for Regal Ware, Inc.
1116 United Virginia Bank Bldg.
Norfolk, Virginia 23514

December 4, 1974

EXHIBIT D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
FEB 25 1977
U. S. COURT OF APPEALS
FOURTH CIRCUIT

No. 75-1219

REGAL WARE, INC.
Appellant

v.

FIDELITY CORPORATION
and AMERICAN FORESIGHT, INC.
Appellees

ORDER

No request for a poll of the court having been made, rehearing en banc is denied.

The panel has considered the petition for rehearing and is of opinion it is without merit.

It is accordingly ADJUDGED and ORDERED that the petition for rehearing shall be, and the same hereby is, denied.

With the concurrences of Judge Winter and Judge Craven.

/s/ [illegible]
For the Court

A True Copy, T e s t e:
William K. Slate, II, Clerk
By /s/ Emily Rueger
Deputy Clerk

EXHIBIT E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REGAL WARE, INC., Appellant	)	
v.	)	CASE NO. 75-1219
FIDELITY CORPORATION, Appellee	)	

PETITION FOR REHEARING IN BANC

To The Honorable Judges of the United States Court of Appeals for the Fourth Circuit

Fidelity Corporation, the defendant-appellee above named, presents this petition for rehearing of this cause, in which, by opinion dated January 11, 1977, it was held liable for the debt of American Foresight, Inc. to the appellant in the amount of $210,571.96 with interest from July 3, 1973, and in support hereof respectfully shows as follows:

VI.

THIS COURT IS WITHOUT JURISDICTION TO HEAR THIS APPEAL.

Rule 4 of the Federal Rules of Appellate Procedure provides that "the notice of appeal . . . shall be filed with the Clerk of the District Court within 30 days of the entry of the judgment or order appealed from." It is conceded that no such notice of appeal was filed within the 30-day period by Regal.

Regal contends that within the 10-day period provided for under Rule 59 F.R.C.P. it filed a purported motion under Rule 59(e) to alter or amend the judgment, thereby tolling the 30-day period specified in Rule 4. However, when the "motion" was filed it stated no grounds and assigned no error.

Rule 7(b)(1) F.R.C.P. states that a motion "shall be made in writing, *shall state with particularity the grounds therefor,* and shall set forth the relief sought." (Italics added)

Since no grounds whatsoever were stated in the "motion," it was therefore ineffective as a motion and cannot serve to toll the time for filing the notice of appeal. See *Fine v. Paramount Pictures,* 181 F.2d 300 (7th Cir. 1950).

Although this Court in the case of *Witt v. Merrill,* 208 F.2d 285 (4th Cir. 1953), distinguished the *Fine* case, *supra,* the points of distinction are not applicable to the present case. The only argument set forth by Regal is that it was misled by Judge Merhige into believing it had additional time. Judge Merhige has by letter stated he has no such recollection, and attached as Exhibit A is Judge Merhige's letter dated August 6, 1975.

Accordingly, since the period for filing the notice of appeal was not stayed by a properly filed motion, the time for filing the notice of appeal under Rule 4 F.R.A.P. has not been complied with and the court is without jurisdiction in this case. The United States Supreme Court has determined that timely filing of a notice for appeal is both mandatory and jurisdictional. See *United States v. Robinson*, 361 U.S. 220 (1960).

In the event this Court holds Regal's notice of appeal to have been timely filed, its reasons therefor should be stated, not only to enlighten counsel but also to provide a basis for review, since the Fourth Circuit at this time appears to be in conflict with other Circuit Courts. See text and cases cited at 9 Moore's Federal Practice, 2d Ed., pp. 960-962.

VII.

For these reasons it is most earnestly and beseechingly urged that this Petition for Rehearing *In Banc* be granted.

Respectfully submitted,

FIDELITY CORPORATION

By: /s/ Richard A. Repp
Richard A. Repp, Of Counsel

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